## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO OFFICE

FORTUNA ENTERPRISES, L.P. A DELAWARE LIMITED PARNERSHIP d/b/a THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS

and

Cases 31-CA-27837 31-CA-27954 31-CA-28011

UNITE HERE, LOCAL 1

Rudy L. Fong-Sandoval, Esq. and Nathan Laks, Esq. of Los Angeles, California, for the General Counsel.

Eric B. Myers, Esq. (Davis, Cowell and Bowe, LLP) of San Francisco, California for the Charging Party.

Stephen R. Lueke, Esq. and Steven M. Kroll, Esq., (Ford and Harrison, LLP) of Los Angeles, California, for the Respondent.

#### SUPPLEMENTAL DECISION

#### Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Los Angeles, California on April 14-18, April 21-25, May 12-15 and June 2-4, 2008, upon the Amended Order Consolidating Cases, Consolidated Complaint, as amended, Compliance Specification and Notice of Hearing issued on March 21, 2007, by the Regional Director for Region 31. On October 21, 2008, I issued my Decision in this case and found that Respondent violated Section 8(a)(1) and (3) of the Act by: issuing employees written warnings, interrogating and threatening employees, denying hotel access to employees and suspending 77 employees for engaging in protected-concerted activity. On April 30, 2009, the Board issued its Decision and Order Remanding the case and severing for the purpose of making further credibility findings concerning the testimony given by employees Antonio Campos and Juan Banales together with further findings of fact, conclusions of law and a recommended order.

<sup>&</sup>lt;sup>1</sup> At the hearing, Counsel for the General Counsel withdrew Complaint allegations 18(a) and (b).

#### Findings of Fact

The Coercive Pushing of Employees by Banquet Chef Pablo Burciaga.

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Complaint paragraph 9 alleges that in March or April 2006 Banquet Chef Pablo Burciaga coerced employees by physically pushing them back toward their workstations during an employee meeting to meet with managers Manny Collera and Efren Vasquez.

In April 2006 a meeting of about 18 employees took place in the kitchen area at 10 Respondent's facility with Assistant Director of Food and Beverage Manny Collera (Collera) and Restaurant Manager Efren Vasquez (Vasquez). This was a regularly scheduled pre-shift meeting of servers called by Collera and Vasquez.<sup>2</sup> At this meeting the employees sought permission to place a piggy bank in the kitchen and dining areas so employees could contribute to the purchase of kitchen equipment. According to Cooks Antonio Campos (Campos) and 15 Juan Banales (Banales), employees had previously complained to supervisors about the lack of needed cooking items but not enough had been provided. According to Campos, employee Mike Kaib asked both Collera and Vasquez if they could have permission to place a piggy bank in the kitchen to purchase kitchen equipment. Collera said he had no authority to give 20 permission for the piggy bank. Kitchen employees Herman Chan, Campos and Banales listened in on the meeting. According to Campos, Banquet Chef Pablo Burciaga (Burciaga) then approached employees Herman Chan, Campos and Banales and told them if they were not on break they should return to work. Burciaga then grabbed Chan and Banales, who were not on break, by the shoulders and shoved them back toward their workstations in the kitchen. 25 Burciaga then came back for Campos and pushed Campos back to his station. Banales testified, consistent with Campos, that Burciaga said if he and Chan were not on break they could not be in the area of the meeting and forced them back to their workstations. Both Campos and Banales said that Kaib them came up to Burciaga and asked Burciaga what he was doing. After some discussion, Burciaga pushed Kaib in the chest and told him to go to his

I have again reviewed the testimony of employees Campos and Banales and that of Burciaga. Campos and Banales impressed me with their forthright attitudes together with their long history of employment with Respondent while Burciaga was often non responsive to questions. Campos and Banales displayed no hostility in their demeanor and gave detailed, complete and consistent testimony without contradiction. Thus, both testified that in April 2006 Burciaga pushed employees back to their workstations and later put his finger in Kaib's chest. The fact that Banales did not mention that Burciaga pushed Campos is not inconsistent since Banales was already back at his workstation when Burciaga returned for Campos. While Burciaga denied being within two feet of Banales, Campos and Chan, or pushing Kaib, an internal investigation by Respondent revealed that in fact Burciaga grabbed Campos and raised his arm toward Kaib. This internal investigation corroborates the substance of Campos and Banales' testimony while refuting Burciaga's denials. I credit the testimony of both Campos and Banales and do not credit Burciaga.

business. The record establishes that employees regularly spoke among themselves in the

kitchen about non-work related subjects during working time.

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<sup>&</sup>lt;sup>2</sup> Neither Collera nor Vasquez testified.

#### Analysis

It is clear that the employees gathered in the kitchen area of the hotel were engaged in protected-concerted activity for the purpose of seeking funds to purchase needed kitchen equipment. While the employees were not in their work areas and not on break, the record establishes that employees regularly moved around in the kitchen and spoke about non-work related subjects. Further, Burciaga's conduct went beyond any legitimate efforts to persuade employees to return to work. The Board has found that acts of physical touching of employees while engaged in protected-concerted activity, including pushing, grabbing an employee's arm and shaking a fist at an employee may violate Section 8(a)(1) of the Act. *Impressive Textiles, Inc.*, 317 NLRB 8, 13 (1995); *Kenrich Petrochemicals*, 294 NLRB 519, 535 (1989); *Rike's a Division of Federated Department Stores*, 241 NLRB 240, 252 (1979). Here, in order to prevent Campos, Chan and Banales from engaging in a protected-concerted meeting, Burciaga grabbed and pushed each individual away from the meeting and poked his finger into Kaib's chest when Kaib attempted to intervene for the three employees. Such action was a coercive attempt to interfere with the employees' rights to engage in protected-concerted activity and violated Section 8(a)(1) of the Act.

#### Conclusions

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Respondent violated section 8(a)(1) of the Act by physically pushing and touching employees for engaging in protected concerted activities.

#### Remedy

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Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.<sup>3</sup>

#### ORDER

Respondent Fortuna Enterprises, L.P., a Delaware Limited Partnership d/b/a/ the Los Angeles Airport Hilton Hotel and Towers, Los Angeles, California, its officers, agents, successors and assigns shall:

1. Cease and desist from physically pushing and touching employees for engaging in protected concerted activities.

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2. Take the following affirmative action designated to effectuate the policies of the Act.

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 <sup>&</sup>lt;sup>3</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

- a. Within 14 days after service by the Region, post at its 5711 West Century Boulevard, Los Angeles, California facility copies of the attached notice marked "Appendix" in both the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 3, 2006.
- b. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: July 21, 2009.

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John J. McCarrick
Administrative Law Judge

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<sup>&</sup>lt;sup>4</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

#### **APPENDIX**

# NOTICE TO EMPLOYEES Posted by Order of the National Labor Relations Board An Agency of the United States Government

#### FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Chose not to engage in any of these protected activities

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

**WE WILL NOT** do anything that interferes with these rights.

WE WILL NOT physically push or touch you for engaging in protected-concerted activities.

		FORTUNA ENTERPRISES, L.P. A DELAWARE LIMITED PARTNERSHIP D/B/A THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Los Angeles, California Regional office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov.">www.nlrb.gov.</a>

11150 West Olympic Boulevard, Suite 700, Los Angeles, California 90064-1824 (310) 235-7351, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

### THIS IS AN OFFICIAL NOTICE AND MOST NOT BE BELACED BY ANTONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.

#### THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above. The final decision and this notice are available in either English or Spanish.